PALEFACE, REDSKIN, AND THE GREAT WHITE CHIEFS IN WASHINGTON: DRAWING THE BATTLE LINES OVER WESTERN WATER RIGHTS

The semi-arid West is facing an acute water crisis as growing urbanization, industrialization, and modern agricultural processes place an ever greater demand on a scarce and vital resource. That crisis is being aggravated by a conflict between western water laws and the judicially created implied-reservation-of-water rights doctrine, which applies to all Indian reservations and federally reserved lands. This Comment examines the conflicts among Indian and federal reserved rights and state vested water rights in a general stream adjudication. The author suggests that immediate modification of the implied-reservation-of-water rights doctrine is essential to enable the states to affirmatively administer and apportion state waters to users on a comprehensive basis to combat the growing crisis over western waters.

INTRODUCTION

Water is an essential commodity for which no substitute exists. Although it covers most of the earth's surface, surprisingly little is available to satisfy man's ever increasing needs.[1] Rapid industrialization, growing urbanization, and large scale irrigation of agricultural lands have caused a major water crisis in the arid West.[2]

1. Less than three percent of the earth's water supply is fresh water. The major portion of this is locked in the ice masses overlaying the earth's polar regions. A very small remaining fraction constitutes the lakes, streams, and underground water supplies of the world. W. EDDY, JR., G. LEON & R. MILNE, CONSIDER THE PROCESS OF LIVING 44 (1972).

2. In the United States, water use averages 1600 gallons per person each day. Modern agricultural uses require large quantities of water. For example, rice, a crop that feeds more people in the world than any other, requires 200 to 250 gallons of water for every pound of rice grown. Approximately 1000 gallons of water are required to produce a single quart of cow's milk, while 2500 to 6000 gallons are necessary to produce each pound of meat. *Id.* at 50. A huge quantity of water is also utilized in nearly all industrial processes. For example, as the need for energy increases, coal and oil shale resources are being tapped to meet the need.

As a result of this growing water crisis, the states must take a more active role in the administration and apportionment of state waters among users. The states' ability to solve the western water crisis has been hampered, however, by a federal water rights doctrine commonly known as the *Winters* doctrine, or the doctrine of implied-reservation-of-water rights. In simple terms, the doctrine of implied-reservation-of-water rights states that when the federal government made a reservation or withdrawal of land, it also impliedly reserved sufficient water to fulfill the purpose of the reservation. The quantities of water reserved include amounts necessary for future as well as present needs of the reservation. The government's water right is not dependent upon the application of the water to any beneficial use, nor is it forfeited through nonuse. The right has a priority date as of the time the reservation was originally withdrawn. It is junior only to those private appropriations dated prior to the reservation's withdrawal.[3]

The reserved water right is applicable to federal reserved lands and Indian reservations.[4] Recently, Indian tribes have asserted expansive reserved water rights. These new demands threaten to

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Mining and manufacturing processes for these natural resource reserves require large amounts of water, diminishing supplies available for human consumption and agriculture. A 1000-megawatt electric generating station, using an evaporative tower for cooling and operating at full capacity, requires 20,000 acre-feet of water annually. A plant producing 250 million cubic feet a day of synthetic natural gas from coal would require approximately 30,000 acre-feet of water per year. A coal liquefaction process, whereby synthetic crude oil is extracted from coal, would consume approximately 65,250 acre-feet of water per year to bring in 100,000 barrels of oil per day. To bring in 2,000,000 barrels of oil shale per day requires the use of 455,000 acre-feet of water per year. NATIONAL ACADEMY OF SCIENCE, REHABILITATION POTENTIAL OF WESTERN COAL LANDS, A REPORT TO THE ENERGY POLICY PROJECT OF THE FORD FOUNDATION 160 (1973).

3. For a comprehensive review of the doctrine and its history, see Ranquist, *The Winters Doctrine and How It Grew: Federal Reservation of Rights to the Use of Water*, 1 B.Y.U. L. REV. 639 (1975).

4. Federal reserved lands should be distinguished from other public domain lands. Federal reserved lands are those enclaves that are withdrawn from the public domain for a specified purpose, such as a national park or forest. The term "public lands" characterizes the remainder of lands owned by the United States, which are subject to private appropriation and disposal under public land laws. The implied-reservation-of-water rights doctrine has heretofore not been applied to these public lands. *See id.* at 651, 679-82.

The doctrine of reserved water rights is also applicable to all Indian reservations, which may be created by treaty, statute, or Executive order. *Id.* at 653. *See generally* Arizona v. California, 373 U.S. 546 (1963); United States v. Walker River Irrigation Dist., 104 F.2d 334 (9th Cir. 1939). Indian sovereignty rights are integral to the reserved water rights doctrine. Indians are accorded special status within the United States as dependent, sovereign nations. The tribes have powers of self-government within Indian territory. Government of a tribe's internal affairs, therefore, is beyond the reach of states or their political subdivisions, and state water laws do not apply to Indian tribes absent specific legislation. *See generally* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 560 (1832).

diminish the common source of supply and thus reduce the quantities available for established state uses.[5] The *Winters* doctrine supports the proposition that newly initiated Indian water uses have legal superiority over preexisting non-Indian uses. Therefore, the fifth[6] and fourteenth[7] amendments to the United States Constitution, providing that just compensation will be paid for private property rights taken for public purposes, do not provide a remedy to private users who suffer monetary losses from that preemption.

Because of the conflict between Indian reserved rights and established non-Indian uses, western waters have become the source of extensive and emotionally charged legal battles. The *Winters* doctrine has been opposed by all the western states since its creation.[8] The states fear the *Winters* doctrine may allow massive federal and Indian reserved water rights claims in the semi-arid West, which would have a crippling economic impact on the western state water users.[9] The western states have a

5. For example, in Arizona, tribes sought to enjoin the city of Tucson from pumping ground water, the city's major water source. United States v. City of Tucson, Civ. No. 75-39 Tuc (JAW) (D. Ariz., order entered October 16, 1975). Further, Senate Bill 905, introduced in 1977, would have enabled five central Arizona tribes, constituting 1% of the population of Arizona, to control 36% of the state's total dependable water supply. It proposed to grant them rights over a million additional acre-feet of surface water, or 92% of the dependable water supply in Pima, Maricopa, and Yuma counties. The city of Phoenix is in Maricopa county. *Providing Water to the Five Central Arizona Indian Tribes for Farming Operations and for Other Purposes: Hearings on S. 905 Before the Senate Select Committee on Indian Affairs*, 95th Cong., 1st Sess. 33, 35 (1977) (statements of Senator Barry Goldwater and Honorable Bob Stump).

6. U.S. CONST. amend. V, which provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

7. *Id.* amend. XIV, § 1, which provides: "No state shall . . . deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

8. "In every Supreme Court case since *Winters* having any relation to the doctrine of federal reserved water rights, every western state has separately or together with other western states filed an amicus brief in opposition to the position of the federal government." Grow & Stewart, *The Winters Doctrine as Federal Common Law*, 10 NAT. RESOURCES LAW. 457, 482 n.93 (1977-78).

9. Federal lands are the source of most of the water in the eleven coterminous western states. This provides 61% of the natural runoff of water in the regions, and most of this comes from land the federal government has reserved or withdrawn from the public domain for specific purposes. The federal government, according to case law, can claim much and in some cases all of this water. The effect on 23 million acres of irrigated land in the West and the potential effect on the world food supply is disastrous. For example, approximately $12.5 billion has been invested by public and private sources in water storage facilities, and addi-

strong public policy interest in maintaining state control over the use of the waters within the boundaries of the state. Future economic growth and community development are dependent upon adequate water supplies. In order for a state to accommodate the competing needs for water, proper planning and control, cost/benefit analysis of any proposed use, and administrative jurisdiction over acquisition, use, and distribution of state waters are required. In addition, the states have an interest in protecting large investments in water resource projects and water rights considered to have vested under state law.

The federal government has a major interest in water rights on federal reserved lands. The federal interest in uniform management of public lands, unhindered by compliance with diverse state water laws, is essential to efficient management of these public reserves. In addition, Congress has an interest in those water resource projects throughout the United States that are primarily funded by congressional legislation. The federal government also has an overall interest in the general water resource policies of the country. As the national water crisis increases, a national approach to pollution abatement, energy production and distribution, and interstate water redistribution may be necessary.

Indian water rights differ from other federally reserved water rights, such as rights for national parks and forests, in that the United States is trustee for the benefit of the Indians who hold equitable title. The United States may sell, lease, quitclaim, release, or otherwise convey its own federal reserved water rights. In contrast, its powers and duties regarding Indian water rights are constrained by a fiduciary duty to the Indians, who are beneficiaries of the trust.[10] However, the fiduciary duty in many aspects is illusory. The legislative authority of the federal government over Indian water rights is similar to its authority over Indian lands.

> The power of Congress extends from the control of the use of the lands, through the grant of adverse interests in the lands, to the outright sale and removal of the Indians' interest. And this is true, whether or not the lands are disposed of for public or private purposes.[11]

Congress may either increase or diminish the Indian water rights by statute, because the federal government has plenary power

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tional billions have been invested to irrigate the 23 million acres mentioned above, which are primarily dependent upon public land water yields. About 96% of the region's 32 million people, and most of its major cities and metropolitan areas are dependent to some degree on public land water. PUBLIC LAND LAW REVIEW COMMISSION, ONE-THIRD OF THE NATION'S LAND 141 (1970).

10. NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE 477 (1973).

11. U.S. DEP'T OF THE INTERIOR, FEDERAL INDIAN LAW 36 (1958).

over Indian water rights and tribal lands.[12] By enforcing reserved Indian water rights through the trust relationship, the federal government could conceivably gain control over sizable portions of western waters. After obtaining control of the water through the trust mechanism, Congress may then unilaterally eliminate any Indian interest in the water pursuant to plenary legislative authority.[13]

As national energy needs become more critical, control of western waters will become essential to the recovery of natural energy resource reserves located throughout the West.[14] Huge quantities of water diverted for industrial and energy contracts reduce the supplies for established state domestic and agricultural uses. Western states have been generally unwilling to export state water resources to neighboring water-needy states, seeking to preserve sufficient quantities for future developments within their own states.[15] Federal control over redistribution of state waters has been minimal, absent Congressional authorization for interstate water projects, such as the Boulder Dam Reclamation Project Act[16] or controversies involving apportionment of interstate streams.[17] The reserved water rights doctrine, however, gives the federal government a basis for claiming a major portion of waters in the West.[18]

12. *See* Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

13. The plenary authority, however, is not absolute power. The taking must be founded upon a reasonable basis, and Indians must be given compensation for lands or rights taken. *See* United States v. Creek Nation, 295 U.S. 103, 109-10 (1935).

14. *See* note 2 and accompanying text *supra*.

15. *See, e.g.*, note 27 and accompanying text *infra*. The state of Arizona has consistently opposed exportation of Colorado River waters to California.

16. 43 U.S.C. §§ 617-617t (1976).

17. The Supreme Court has discretion to exercise original jurisdiction over interstate stream apportionments. The Supreme Court is the only court where jurisdiction over all parties may be obtained at one time. If the Supreme Court declines to hear the controversy, separate actions are required in each state, frequently resulting in inconsistent decrees. Interstate apportionment suits may be filed by the states against each other or initiated by the United States in the Supreme Court. *See* Ranquist, *supra* note 3, at 709-10. *See also* United States v. Nevada, 412 U.S. 534 (1973); Arizona v. California, 373 U.S. 546 (1963); Nebraska v. Wyoming, 325 U.S. 589 (1945); Colorado v. Kansas, 322 U.S. 708 (1944); Washington v. Oregon, 297 U.S. 517 (1936); New Jersey v. New York, 283 U.S. 805 (1931), *modified*, 347 U.S. 995 (1954); Connecticut v. Massachusetts, 282 U.S. 660 (1931); Wyoming v. Colorado, 259 U.S. 496 (1922), *vacated and new decree entered*, 353 U.S. 953 (1957); Kansas v. Colorado, 185 U.S. 125 (1902).

18. SENATE SELECT COMMITTEE ON NATIONAL WATER RESOURCES, S. REP. NO. 15, 87th Cong., 1st Sess. 65 (1961). The United States owns sizable land bases

Federal reserved rights coupled with expansive Indian reserved water claims could cause states to effectively lose control of the administration and distribution of a major portion of the waters currently under exclusive state jurisdiction. The Justice Department has recently filed water adjudication suits concerning watersheds in several western states, increasing the apprehensions of state water officials and private water rights holders that a federal and Indian monopoly of western waters could result.[19] This Comment will examine the problem created by the adjudication of rights to western waters under the concurrent application of the reserved water rights doctrine and state water laws, and the effect the doctrine has on the water rights of the nation's 800,000 Indians, federal land reserves, and millions of private water users in the West.

THE *WINTERS* DOCTRINE

The *Winters* doctrine is based on the 1908 Supreme Court decision of *Winters v. United States*.[20] In *Winters*, the federal government brought suit on behalf of Indians on the Fort Belknap Indian Reservation in Montana, to enjoin upstream farmers from diverting water from the Milk River for irrigation. The Court held that the waters of the Milk River, arising on, flowing through, or bordering the reservation, were *impliedly* reserved for the Indians as of the date the reservation was created.[21] The Court noted the policy of the government and the desire of the Indians that the Indians change their nomadic habits and develop an agrarian society.[22] Because portions of the reserved lands were dry and arid, large quantities of water would be required for irrigation to make the lands productive.[23] The right to future use of the water

throughout the West. In Alaska, 96% of the state is under federal ownership; Nevada, 87%; Utah, 66%; Idaho, 64%; Oregon, 53%; California, 45%; Colorado, 36%; New Mexico, 34%; Montana, 30%; and Washington, 29%. BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS 10 (1976).

19. *See* note 151 and accompanying text *infra*. *See also* United States v. City of Tucson, Civ. No. 75-39 TUC (JAW) (D. Ariz., order entered October 16, 1975); United States v. Truckee Carson Irrigation Dist., 71 F.R.D. 10 (D. Nev. 1975), Civ. No. R-2987-JBA (D. Nev., filed Dec. 21, 1973).

20. 207 U.S. 564 (1908).

21. *Id.* at 576-77.

22. *Id.* at 576.

23. *Id.* at 566. The *Winters* Court concluded that the implied-reservation-of-water rights was necessary in the course of fair dealings with the Indians, as without the water, the Indian reservation lands would have been nearly valueless. *Id.* at 576-77. The courts have been liberal in recognizing certain rights not clearly set out in the individual treaties. Three primary rules of construction have been developed by the courts in relation to Indian treaties. (1) Ambiguous expressions must be resolved in favor of the Indian parties concerned. McClanahan v. State Tax Comm'n, 411 U.S. 164, 174 (1973); Carpenter v. Shaw, 280 U.S. 363, 367 (1930);

was vested in the Indians even though the right was presently not exercised. The doctrine provides that the Indian reserved water right cannot be forfeited by nonuse or by state action through condemnation, inverse condemnation, or statute.[24] The federal government is obligated, as trustee of the Indian reserved water rights, to protect and enforce those rights.[25]

The Supreme Court did not address the *Winters* doctrine again for over fifty years. Then in 1963, the Court reaffirmed the doctrine in *Arizona v. California*,[26] a comprehensive adjudication of water rights on the Lower Colorado River Basin.[27] Arizona had sued the state of California and several of its public agencies.

Winters v. United States, 207 U.S. 564, 576-77 (1908). (2) Indian treaties must be interpreted as the Indians themselves would have understood them. Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970); United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938); Worchester v. Georgia, 31 U.S. (6 Pet.) 515, 582 (1832). (3) Indian treaties must be liberally construed in favor of the Indians. Choctaw Nation v. United States, 318 U.S. 423, 431-32 (1943); United States v. Walker River Irrigation Dist., 104 F.2d 334, 337 (9th Cir. 1939).

24. *See* Ranquist, *supra* note 3, at 655.

25. *See* Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252, 256-58 (D.D.C. 1973).

26. 373 U.S. 546 (1963).

27. The Colorado River Compact, drawn by representatives of the seven Colorado Basin states in 1922, delineated an equal division of the Colorado River between the Upper and Lower Basins. Lee's Ferry, Arizona, was chosen as the dividing site, with each basin receiving 7.5 million acre-feet of water annually. In 1949, the Upper Basin share was allotted to Wyoming, Colorado, Utah, New Mexico, and Arizona by mutual agreement. The Lower Basin states, Arizona, California, Nevada, Utah, and New Mexico, however, could not agree to a division of the lower 7.5 million acre-feet allotment. Utah, Arizona, and New Mexico participated in both negotiations, possessing land bases on tributaries in both Upper and Lower Basins. Arizona, the chief dissenter among the Lower Basin states, also attempted to enjoin the Boulder Dam Project and obtain a judicial apportionment of the Colorado River in the absence of the United States as a party. Arizona v. California, 283 U.S. 423 (1931). The effort failed, and Arizona ratified the Compact in 1944 after exhausting all administrative and judicial attempts to increase its share of the Colorado River.

In 1955, Arizona again brought suit against California, Arizona v. California, 373 U.S. 546 (1963), seeking judicial adjudication of water rights on the Colorado River. The final decree, 376 U.S. 340, 344 (1964), partitioned the 7.5 million acre-feet allotted to the Lower Basin states as follows: California, 4.4 million acre-feet; Arizona, 2.8 million acre-feet; and Nevada, 0.3 million acre-feet. Any annual surpluses were to be awarded to: California, 50%; Arizona, 46%; and Nevada, 4%. Shortages were to be divided among the states, projects, and water users in each state by the Secretary of the Interior at his discretion.

Indian tribes received 1 million acre-feet for 135,000 "irrigable acres." Other federal land needs were not specifically quantified, but were awarded in terms of amounts necessary to fulfill the purposes of the reservation. The amounts used by federal and Indian reservations were ultimately to be charged against the state in which the water was used. *See* Trelease, *Arizona v. California: Allocation of*

Later, Nevada, New Mexico, Utah, and the United States became parties. The initial controversy involved the interstate allocation of the Colorado River and its tributaries. The federal government asserted water rights claims on behalf of five Indian reservations in the Colorado River Basin,[28] several national forests and parks, and the Boulder Canyon Project Act[29] which created the Boulder Dam Reclamation Project.

In addressing the tribal water claims, the Court held that the United States had reserved the water rights for the Indians, effective as of the time the Indian reservations were created. The Court concluded the rights were "present perfected rights," entitled to priority over any later dated water rights. Further, the reservation of water included sufficient quantities to satisfy present and future needs of the reservation.[30]

The *Arizona* Court not only reaffirmed the viability of the *Winters* doctrine for Indian reserved rights, but asserted that the doctrine was also applicable to other federal reservations, such as national parks, forests, recreation areas, and military installations.[31] The Court held that the amounts of water reserved for Lake Mead National Recreation Area and Gila National Forest should also be quantified in terms of sufficient quantities to fulfill the purposes of the reservation, including amounts for any future requirements.[32]

The *Winters* doctrine received additional teeth in *Cappaert v. United States*.[33] In *Cappaert*, the National Park Service sought to enjoin an adjacent landowner from pumping ground water from an aquifer supplying Devil's Hole, a deep cavern on federal lands in Nevada harboring an endangered species of fish.[34] The Supreme Court unanimously held that the United States' intention to appropriate enough water to "maintain the level of the

Water Resources to People, States, and Nation, 1963 SUP. CT. REV. 158, for an in-depth review of the holding.

28. Chemehuevi, Cocopah, Yuma, Colorado River, and Fort Mohave Reservations. Arizona v. California, 373 U.S. 546, 595 n.97 (1963).

29. 43 U.S.C. §§ 617-617t (1976).

30. Arizona v. California, 373 U.S. 546, 600 (1963).

31. *Id.* at 601.

32. *Id. See also* S. RIFKIND, REPORT OF THE SPECIAL MASTER, ARIZONA V. CALIFORNIA 295, 343 (1960).

33. 426 U.S. 128 (1976).

34. Devil's Hole was inhabited by a unique, endemic species of desert fish, traceable to the Pleistocene Era. The pool was reserved in 1952, under the American Antiquities Preservation Act of 1906, 16 U.S.C. § 431 (1976), authorizing the President to reserve Devil's Hole and its rare inhabitants for historic or scientific interests. The pumping had dangerously lowered the water table, exposing a large rock shelf, the primary spawning area of the Devil's Hole pupfish. The population was in danger of depletion below an acceptable breeding population. Cappaert v. United States, 426 U.S. 128, 131-36 (1976).

pool to preserve its scientific value" was implicit when the United States withdrew the reservation.[35] Prior to *Cappaert*, the Supreme Court had not expressly included ground water in the implied-reservation-of-water rights doctrine.[36] Acknowledging that necessity was the basis for the creation of the reserved water rights doctrine, the Court held that the United States could protect both surface and ground water from diversion when necessary to fulfill the purposes of the reservation.[37] The Court qualified its holding, however, stating that the implied-reservation-of-water rights doctrine reserved only the "amount of water necessary to fulfill the purposes of the reservation, *no more*."[38]

Since the *Arizona v. California*[39] decision, the *Winters* doctrine has become firmly rooted in case law. The Supreme Court has consistently reaffirmed the doctrine in subsequent cases concerning federal and Indian reserved water rights.[40] The *Winters* doctrine was created as an equitable remedy to deal specifically with Indian tribes where the federal government failed to reserve water for the tribe's livelihood. *Arizona v. California*,[41] however, extended the doctrine to apply to all federal reserved lands. The *Cappaert* decision brought all water resources, including ground and surface waters, within the purview of the doctrine.

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35. Cappaert v. United States, 426 U.S. 128, 147 (1976).

36. Some lower courts had applied the doctrine of reserved water rights to ground water, however, prior to *Cappaert*. *See, e.g.*, Tweedy v. Texas Co., 286 F. Supp. 383 (D. Mont. 1968); United States v. Fallbrook Pub. Util. Dist., 165 F. Supp. 806 (S.D. Cal. 1958), *rev'd on other grounds*, 347 F.2d 48 (9th Cir. 1965).

37. Cappaert v. United States, 426 U.S. 128, 143 (1976). *Cappaert* could be distinguished on its facts as involving an endangered species. In addition, the pool itself was the very purpose for the reservation. Even under prior appropriation schemes, the government's reservation date preceeded Cappaert's water right date. The case has, however, consistently been cited as authority in implied-reservation-of-water rights cases. *See, e.g.*, United States v. New Mexico, 438 U.S. 696 (1978).

38. 426 U.S. 128, 141 (emphasis added).

39. 373 U.S. 546 (1963).

40. *See, e.g.*, United States v. New Mexico, 438 U.S. 696 (1978); Cappaert v. United States, 426 U.S. 128 (1976); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976); United States v. District Court of Eagle County, 401 U.S. 520 (1971); United States v. District Court of Water Div. No. 5, 401 U.S. 527 (1971).

41. 373 U.S. 546 (1963).

Title to a water right is not perfected until there has been an adjudication or legal determination of the right and title is established by decree in a court of proper jurisdiction.[42] Water rights adjudications are equitable actions to determine and fix the ownership, nature, and extent of rights of user claims to the same source of supply in relation to each other.[43] Absent statutory authorization to administratively determine federal reserved water rights, state and federal court adjudications are the only means to perfect water rights and determine the relationship between reserved water claims and water rights established under state laws. Traditionally, federal and Indian reserved water claims have been adjudicated solely in federal courts,[44] which hindered final resolution of water rights controversies involving both state and federally reserved water rights. Indian tribes and the federal government are political sovereigns, and they are immune from suit absent express Congressional authority or tribal consent.[45] Without consent of the government or the tribe, a state water user was unable to obtain a final adjudication of his water rights in relation to any federal or Indian claims.

To alleviate the harshness of this consent requirement, Congress enacted legislation, popularly known as the McCarran Amendment, consenting to joinder of the United States as a party in general water rights adjudications.[46] The McCarran Amend-

42. 3 C. KINNEY, A TREATISE ON THE LAW OF IRRIGATION AND WATER RIGHTS 2755 (2d ed. 1912).

43. *Id.* at 2756-57.

44. *See, e.g.*, United States v. New Mexico, 438 U.S. 696 (1978); Cappaert v. United States, 426 U.S. 128 (1976); Arizona v. California, 373 U.S. 546 (1963); United States v. Powers, 305 U.S. 527 (1939); Winters v. United States, 207 U.S. 564 (1908); United States v. Ahtanum Irrigation Dist., 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957), *rev'd*, 330 F.2d 897 (9th Cir.), *rehearing denied*, 338 F.2d 307 (9th Cir. 1964), *cert. denied*, 381 U.S. 924 (1965); Conrad Inv. Co. v. United States, 161 F. 829 (9th Cir. 1908).

45. United States v. United States Fid. & Guar. Co., 309 U.S. 506, 514 (1940). "It has heretofore been shown that the suability of the United States and the Indian Nations, whether directly or by cross action, depends upon affirmative statutory authority. Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent the attempted exercise of judicial power is void." *Id.*

46. 43 U.S.C. § 666 (1976), which provides in part:

> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States . . . shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain re-

ment is silent regarding Indian reserved water rights held in trust by the United States. However, in a surprising decision, the Supreme Court held in *Colorado River Water Conservation District v. United States*, conjointly with *Akin v. United States*,[47] that the McCarran Amendment did not diminish the federal district court jurisdiction; rather, the state courts have concurrent jurisdiction over reserved water rights for both Indian tribes and other federal reserved lands.[48] The Court dismissed the federal suit in *Akin*, finding that concurrent federal proceedings were inadvisable. Primarily, the Court noted the "clear federal policy evinced by [the McCarran Amendment] is the avoidance of piecemeal adjudication of water rights in a river system."[49] The Court interpreted the legislation as "bespeak[ing] a policy that recognizes the availability of comprehensive state systems for adjudication of water rights as a means for achieving these goals."[50]

In *Akin*, the Government, on behalf of the Indians, contended that absent express Congressional authorization Indian water rights should not be subjected to state court jurisdiction. They asserted that the federal courts are the only proper forum for adjudication of Indian water rights, and subjecting their claims to state court adjudication was a direct breach of the United States'

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view thereof, in the same manner and to the same extent as a private individual under like circumstances.

47. 424 U.S. 800 (1976). *Akin v. United States* was renamed *Colorado River Water Conservation District v. United States* on appeal. Mrs. Akin was unable to finance the appeal and lost the alphabetical preference enjoyed in the lower court decision. The case is commonly referred to as *Akin* by legal scholars, however, and will hereafter be called *Akin v. United States* in this Comment.

48. *Id.* at 809. Prior to *Akin*, Colorado enacted legislation establishing seven regional water divisions in the state. *See* Colorado Water Rights Determination and Administration Act, COLO. REV. STAT. ANN. §§ 37-92-101 to 37-92-602 (1976). Each division would be involved in continuous settlement of water claims. The United States brought suit in federal district court against some 1000 Colorado water users in Division Seven, seeking adjudication of water rights on behalf of itself and certain Indian tribes, invoking the jurisdictions of the district court under 28 U.S.C. § 1345 (1976) which provides: "Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress." In a separate action, one of the federal suit defendants sought to make the United States a party in a state proceeding, pursuant to the McCarran Amendment, so that all claims could be adjudicated in one forum. 424 U.S. at 804-06.

49. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 819 (1976).

50. *Id.*

fiduciary duty to Indian tribes.[51] The *Akin* Court dismissed the contention that state adjudications would breach the government's fiduciary duty to protect Indian rights:

> Mere subjection of Indian rights to legal challenge in state court, however, would no more imperil those rights than would a suit brought by the Government in district court . . . to resolve conflicting claims to a scarce resource. The Government has not abdicated any responsibility fully to defend Indian rights in state court, and Indian interests may be satisfactorily protected under regimes of state law.[52]

The rationale of the *Akin* Court is convincing. Should the federal court decline to hear the state claims along with the reserved water claims, a danger of inconsistency between the federal and state decrees is present. This consideration should outweigh the contentions that Indian water rights will not receive just adjudication in state courts before judges elected by a popular, non-Indian majority.[53] Because federal court judges are appointed by a non-Indian President and approved by a non-Indian Congress, the asserted danger of bias is possible in either the state or the federal court system. Local state judges are generally more knowledgeable about local water resources, uses, and state laws; and they are competent to apply federal law as well.

The *Akin* decision does not grant across-the-board approval for dismissing federal and Indian water rights suits filed in federal district court in favor of state adjudications. The Court indicated the dismissal was warranted on the facts in *Akin*.[54] The Court declined to decide if the same result would occur if state proceedings were inadequate to resolve the federal claims, if less

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51. Critics point out that 25 U.S.C. § 1322(b) and 28 U.S.C. § 1360(b) (1976) provide that:

> [Nothing in these sections] shall authorize alienation . . . of real or personal property, including water rights, belonging to any Indian or . . . held in trust by the United States . . . inconsistent with any federal treaty, agreement, or statute, . . . ; or shall confer jurisdiction upon the state to adjudicate the ownership of right to possession of such property or any interest therein.

The *Akin* Court construed the sections, however, as not limiting the special consent to jurisdiction given in the McCarran Amendment, because under the rule of construction a specific statute is not nullified by a general statute, regardless of priority of enactment. 424 U.S. at 812-13 n.20 (citing Morton v. Mancari, 417 U.S. 535, 550-51 (1974)).

52. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 812 (1976).

53. *See Indian Water Rights: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 94th Cong., 2d Sess. 51-66 (1976) (statements of Wendell Chino, President, National Tribal Chairman's Association (NTCA), and President, Mescalero Apache Tribe; Mel Tonasket, President, National Congress of American Indians; Daniel Old Elk; President, Native American Nat'l Resource Dev. Fed'n (NANRDF); and Thomas W. Fredericks, Native American Rights Fund).

54. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 820 (1976).

extensive state water rights were involved, or if more extensive proceedings had already occurred in federal court.[55] It is possible that the federal adjudication would not be dismissed in favor of state proceedings where the state lacks a comprehensive state water rights adjudication system.

To ensure the efficient resolution of water rights controversies in state courts, specialized state water adjudication systems should be established to provide for the comprehensive, continuous adjudication of water rights throughout the state. The system established by Colorado in the Colorado Water Rights Determination and Administration Act[56] found favor with the Supreme Court and provided compelling justification for dismissing the *Akin* controversy in favor of the state proceedings. By providing a separate system solely to adjudicate water claims within predetermined regions of the state, controversies could be handled efficiently and brought to a rapid conclusion rather than becoming mired within crowded federal and state court dockets.

Quantification of Reserved Winters *Doctrine Rights*

The quantum of water reserved under the doctrine of implied-reservation-of-water rights is elusive. In *Winters v. United States*[57] the Court held that the doctrine applied to all waters arising on, flowing through, or bordering on the reservation.[58] Extensive application of that standard would have a harmful economic impact on western states with limited water supplies. One study has indicated that sixty-one percent of the 363 million acre-feet of water arising in the eleven western states originates in national forests and national parks.[59] Indian reserved water claims and uses are more expansive than water claims for federal reserved lands. If the courts were to extend the doctrine to its utmost by liberal application of the "arising on" standard, states could lose administrative control of the major portion of state waters. As currently applied, the doctrine of reserved water rights places senior federal and Indian water rights above any junior

55. *Id.*
56. COLO. REV. STAT. ANN. §§ 37-92-101 to 37-92-602 (1976).
57. 207 U.S. 564 (1908).
58. *Id.* at 576-77.
59. C. WHEATLEY, C. CORKER, T. STETSON, & D. REED, STUDY OF THE DEVELOPMENT, MANAGEMENT AND USE OF WATER RESOURCES ON THE PUBLIC LANDS 402-06, and table 4 (1969).

state water rights. Strict application of the doctrine would disallow even minimal domestic (household) uses by state water users in times of shortage or where water supplies are limited.[60] The reservation of an unspecified quantum of water, exempt from state appropriation laws, makes the state appropriation systems largely unadministratable.[61]

The Supreme Court has not delineated the exact purposes for which *Winters* doctrine rights apply. Rather, the doctrine is expressed in terms of reserving "that amount of water necessary to fulfill the purpose of the reservation."[62] Determination of the purpose of the reservation is left to court interpretation on a case-by-case basis.[63] The courts have adopted varying standards for quantifying reserved water rights.[64] Three primary approaches have emerged from the court decisions.[65]

Methods of Quantifying Reserved Water Rights

The open-ended method of quantifying reserved water rights permits extension of the right to the ultimate needs of the tribe. In 1908, the Ninth Circuit held in *Conrad Investment Co. v. United*

60. *See, e.g.*, United States v. Ahtanum Irrigation Dist., 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957), *rev'd*, 330 F.2d 897 (9th Cir. 1964), *rehearing denied*, 338 F.2d 307 (9th Cir. 1964), *cert. denied*, 381 U.S. 924 (1965), holding that "Indians [are] awarded the paramount right regardless of the quantity remaining for the use of white settlers . . . . It is plain if the amount awarded . . . for the benefit of the Indians . . . equaled the entire flow . . . the decree would have been no different." *Id.* at 327.

61. Palma II, *Indian Water Rights: A State Perspective After Akin*, 57 NEB. L. REV. 295, 311 (1978), indicates:

> From the states' standpoint, there is an imperative need to inventory Indian water requirements and to adjudicate and quantify Indian rights so that their relationship to non-Indian rights can be established. Without a reasonable quantification, Indian water rights claims may become so expanded by conceptualistic thinking that a situation of chaos will be created in the appropriation system.

62. Cappaert v. United States, 426 U.S. 128, 141 (1976).

63. The Court in Winters v. United States, 207 U.S. 564, 576 (1908), for example, stated that the reservation was established to induce the Indians to relinquish their nomadic habits and to become a civilized and pastoral people. Similarly, the Court in Arizona v. California, 373 U.S. 546, 600 (1963), recognized the agrarian purposes of the reservation and quantified tribal reserved rights in terms of "irrigable acreage." *But cf.* United States v. Truckee Carson Irrigation Dist., 71 F.R.D. 10 (D. Nev. 1975), Civ. No. R-2987-JBA (D. Nev., filed Dec. 21, 1973), in which the Pyramid Lake Tribe sought a decree for sufficient water to maintain the lake and its fisheries. Quantification in terms of irrigable acreage is inappropriate for that purpose, and the Court would have to fashion an alternative standard, perhaps in terms of minimum depths or inlet flows.

64. Quantification of water rights refers to determining the specific quantum, or portion of water, comprising a water right. The standard of measure is variable, including but not limited to acre-feet, miner's inches, and irrigable acreage.

65. For a review of the various standards and their relative merits, see Note, *A Proposal for the Quantification of Reserved Indian Water Rights*, 74 COLUM. L. REV. 1299 (1974).

States[66] that the "amount of water [that] will be required may not be determined with absolute accuracy . . . but the policy of the government [is] to reserve whatever water . . . may be reasonably necessary, not only for present uses, but for future requirements . . . ."[67] The court permitted non-Indians to continue to use surplus waters from the creek subject to the understanding that paramount Indian rights extended to the ultimate needs of the Indians and the development of Indian agriculture on the reservation.[68] When the Indian needs increased, the tribe could seek modification of the decree, even if the modification eliminated all non-Indian uses.[69] The displaced state beneficial uses were not compensable because no portion of the reserved rights had been open to appropriation or acquisition under state law by the defendants or their predecessors.[70] This open-ended approach harbors economic hardship for state users. Established, nonreserved water rights are threatened by subsequent preemption whenever increased reserved rights are exercised. Because the ultimate needs of the reservation relate back to the original date of the creation of the reservation, established state beneficial uses must cease in favor of reserved water rights should insufficient surplus waters be available for increased Indian and federal needs. Being junior to reserved water rights, displaced state beneficial uses are not compensable.

A second approach to the quantification of reserved rights issue requires a need and use prerequisite. At least one court permanently quantified the reserved tribal claims by imposing a requirement of foreseeable Indian needs and uses.[71] Limiting the reserved right to the reasonable needs and uses in existence on the reservation at the time of quantification eliminates the preemption of established state uses, an inherent problem of the open-ended approach. Whenever non-Indian uses are subject to preemption, users must gamble in making large investments for water-related developments on streams where reserved claims

66. 161 F. 829 (9th Cir. 1908).
67. *Id.* at 832.
68. *See generally id.* at 834-35.
69. *Id.* at 835.
70. *See generally id.*, indicating that Indian rights are prior and paramount to defendant's rights. *Accord*, United States v. Ahtanum Irrigation Dist., 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957), *rev'd*, 330 F.2d 897 (9th Cir. 1964), *rehearing denied*, 338 F.2d 307 (9th Cir. 1964), *cert. denied*, 381 U.S. 924 (1965).
71. Tweedy v. Texas Co., 286 F. Supp. 383, 385 (D. Mont. 1968).

exist. Therefore, most users are unwilling to assume that risk, and development on the streams is inhibited. With a permanent court decree establishing the rights of all parties concerned, all classes of users are able to develop the water resource without fear of future preemption of their established water rights and uses. However, the need and use prerequisite approach has been severely criticized because its application tends to establish the Indian reserved water rights at artificially low levels because of the minimal level of development currently existing on Indian reservations.[72]

The third approach to quantifying Indian reserved water rights was set out by the Supreme Court in *Arizona v. California*.[73] The "irrigable acreage" standard is the most definitive and widely accepted policy for quantifying Indian reserved water rights. The Supreme Court rejected Arizona's argument that the amount of water should be quantified according to reasonably foreseeable needs. The Court stipulated that the number of Indians living on the reservations in the future and projected water needs for those Indians are too speculative to use as a basis for permanent quantification of water rights.[74] The Court also rejected the proposal of equitable apportionment of the water according to the supply and the needs of both the Indian and non-Indian water users.[75] The doctrine of equitable apportionment is a judicially created doctrine for resolving interstate water controversies.[76] Because Indian tribes are not states, the Court declined to apply the equitable apportionment standard in deference to the irrigable acreage standard.[77]

The Supreme Court suggested that quantification on every reservation was appropriate, but stopped short of setting a universal standard for quantifying reserved rights.[78] On the facts in *Arizona*, the Court concluded that the only feasible and fair way by which to measure the reserved rights was to determine and allocate water needs for the "practicably irrigable acreage" on the reservation.[79] Although there has been some criticism of the irrigable acreage standard, it has been generally accepted as the best

72. *See* Note, *A Proposal for the Quantification of Reserved Indian Water Rights*, 74 COLUM. L. REV. 1299, 1314 (1974), for a discussion of the advantages and disadvantages of the need and use approach.

73. 373 U.S. 546 (1963).

74. *Id.* at 600-01.

75. *Id.* at 601.

76. *See* Kansas v. Colorado, 206 U.S. 46, 95-118 (1907), holding that each state should enjoy the equitable apportionment of benefits from the flow of a river.

77. Arizona v. California, 373 U.S. 546, 597 (1963).

78. *See generally id.* at 600-01.

79. *Id.* at 600.

solution to the problem.[80] Critics of the irrigable acreage approach assert that the Indian reserved rights are not confined to irrigation, but extend to any beneficial uses.[81] They fear quantification in terms of agrarian purposes may severely hamper modern industrial, resource, and energy development on the reservations. Citing the *Winters* case, they assert the tribes have water rights for both "agriculture and the arts of civilization,"[82] construing the latter to include industrial and any other uses.[83] Proponents of the "irrigable acreage" standard assert that it does not limit permissible uses of the water. Once the water is quantified based on the "irrigable acreage," it may be used for other purposes. Support for this view is found in *Arizona v. Califor-*

80. For a critical view of the irrigable acreage standard, see Note, *A Proposal for the Quantification of Reserved Indian Water Rights*, 74 COLUM. L. REV. 1299 (1974). The author points out that the irrigable acreage standard awards tribes much more water than they need, as the reservations contain many more acres than can practicably be put to use. For example, the author indicated that "the maximum amount of water allocated for the Fort Mojave Reservation was based on its 18,974 acres, even though no more than twenty-three acres had ever been irrigated and the population at the time of the award consisted of one family." *Id.* at 1312 n.80. The author further pointed out that:

> [F]ive Indian Reservations in the Lower Colorado River Basin were awarded one million acre-feet of water per year, or about 15 per cent of the Lower Basin supply. Of this million, about 200,000 acre-feet had been put to use at the time of the trial, although some of the withdrawals dated back to 1865, and the rights they reserved thus had first priority on the lower river. . . . If the full one million acre-feet is put to use on the reservations, Los Angeles is likely to receive *no water* from the Colorado River, although it has spent $500 million on an aqueduct to import 1.3 million acre-feet per year.

Id. (citing Meyers, Book Review, 77 YALE L.J. 1036, 1042 n.15 (1968), *cited in* F. TRELEASE, FEDERAL-STATE RELATIONS IN WATER LAW 125, 126 (1971)).

81. *See* Bloom, *Indian Paramount Rights to Water Use*, 16 ROCKY MTN. MIN. L. INST. 669, 691 (1971) (citing W. VEEDER, WINTERS DOCTRINE RIGHTS IN THE MISSOURI RIVER BASIN, MS. 1, 19 (1965)):

> Industrial and/or municipal uses of water are becoming increasingly important on the reservations. Generation of hydroelectricity, generation of electricity by steam, the mining of coal or minerals, recovery of gravel, on the reservation all call for the exercise of *Winters Doctrine Rights*. Where industrial uses become important, municipal needs usually must be met. There are established methods for determining the quantities of water needed for each of the purposes mentioned. They will, of course, govern the measure of the rights which must be asserted on behalf of the Indians.
>
> There are reservations where the land is so poor that the *Winters Doctrine Rights* are perhaps the only resource of value. Sale or lease of water on Indian reservations may thus prove to be the highest, best or most profitable use under those circumstances.

82. Winters v. United States, 207 U.S. 564, 576 (1908).

83. *See* Veeder, *Water Rights in the Coal Fields of the Yellowstone River Basin*, 40 LAW & CONTEMP. PROB. 77, 89 (Winter 1976).

nia,[84] in which the special Master emphasized that although the standard for quantification was defined by irrigable acreage, the uses to which the Indians could apply the water was not limited. He stated, "I hold only that the amount of water reserved and hence the magnitude of the water rights created is determined by agriculture and related requirements, since when the water was reserved that was the purpose of the reservation."[85]

Trend Toward Limiting Non-Indian Reserved Water Rights Claims

In 1978, the Supreme Court limited the scope of the implied-reservation-of-water rights doctrine for non-Indian reserved water rights in *United States v. New Mexico*.[86] The United States Forest Service sought to preserve minimum instream flows in the Gila National Forest for aesthetic, environmental, recreational, and fish-preservation purposes.[87] The Forest Service asserted that the Multiple-Use Sustained-Yield Act of 1960[88] expanded the purposes for which the forest was reserved and that increased water uses and needs arising under the Act should relate back to the date of creation of the forest. Although the Court acknowledged that the Multiple-Use Sustained-Yield Act of 1960 was intended to broaden the purposes for which national forests had previously been administered, the Court refused to apply the doctrine to this later expanded purpose. The Court limited the doctrine to the *original* purposes for which the forest was reserved.[89] The *New Mexico* Court expressed concern that where "a river is fully appropriated, federal reserved water rights [would] frequently require a gallon-for-gallon reduction in the amount of water avail-

84. 373 U.S. 546 (1963).

85. S. RIFKIND, REPORT OF THE SPECIAL MASTER, ARIZONA V. CALIFORNIA 295, 254, 265 (1960).

86. 438 U.S. 696 (1978).

87. *Id.* at 705. Gila National Forest's reserved water rights were also the subject of adjudication in Arizona v. California, 373 U.S. 546 (1963). At that time, the Supreme Court quantified the rights only in terms of amounts necessary to fulfill the purposes of the reservation. *See* Arizona v. California, *decree*, 376 U.S. 340, 350 (1964).

88. 16 U.S.C. § 528 (1976) provides that:

> It is the policy of Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of this Act are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in [the Organic Administration Act of 1897] . . . .

89. United States v. New Mexico, 438 U.S. 696, 713 (1978). The Court found that "Congress intended forests to be reserved for only two purposes, 'to conserve the water flows and to furnish a continuous supply of timber for the people.'" *Id.* at 706-08 (citing 30 CONG. REC. 967 (1896) (remarks of Congressman McRae)).

able for a water-needy state and private appropriators."[90] Further, the Court noted that quantifying reserved water rights of the national forests is of critical importance in the West, where water is scarce.[91]

The *New Mexico* decision is limited to non-Indian reserved water rights on its facts. Although the Court in *Arizona v. California*[92] found no reason to distinguish between Indian and other federal reserved rights, the Supreme Court might not limit the *Winters* doctrine rights to the original, primarily agrarian, purposes of the Indian reservations. However, Justice Rehnquist, writing for the majority in *New Mexico*, cited *Winters v. United States*[93] for the proposition that the Court must examine both the asserted water right and the specific purposes for which the land was reserved when quantifying implied-reservation-of-water rights.[94]

Proposed Expansion of Indian *Winters* Doctrine Rights

William Veeder of the Bureau of Indian Affairs, adamantly asserts that Indian reserved rights should not be limited to the original purposes of the Indian reservations.[95] Veeder, a proponent of expansive Indian reserved rights, claims that Indian reserved rights differ significantly from the rights to the use of water on other federal lands.[96] Veeder and other proponents of this view

90. *Id.* at 705.

91. *Id.* (citing C. WHEATLEY, STUDY OF THE DEVELOPMENT, MANAGEMENT, AND USE OF WATER RESOURCES ON THE PUBLIC LANDS 211 (1969)).

92. 373 U.S. 546 (1963).

93. 207 U.S. 564 (1908).

94. 438 U.S. 700 n.4 (1978).

95. Veeder, *Water Rights in the Coal Fields of the Yellowstone River Basin*, 40 LAW & CONTEMP. PROB. 77, 89 (Winter 1976).

96. Veeder argues that the Indians themselves, not the federal government, have reserved the waters on tribal lands and that the tribes have a right independent of the government's assertion of the right on their behalf because of their immemorial occupancy of the land. Veeder bases his view on the Supreme Court case of United States v. Winans, 198 U.S. 371, 381 (1905), "[T]he treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." The *Winans* case, however, dealt with express, tribal fishing rights and not implied-reservation-of-water rights. There is some danger in adopting the view espoused by Veeder. If the water rights were reserved by the Indians at the time the treaty was negotiated, the doctrine would conceivably be inapplicable to Indian reservations created by statute or Executive order, resulting in no water rights for these tribes without an express reservation. In addition, such an interpretation may restrict reserved rights to the minimal levels in use at the time of the treaty negotiations. Veeder's position is not widely accepted. See Ranquist,

treat the Indian rights as being appurtenant to the land and usable for any beneficial, present, or future uses. They assert the Indians own "prior and paramount" rights to any waters and streams that border or traverse their tribal lands because of the Indians' "immemorial occupancy" of the land.[97] This expansive proposal would not limit the doctrine's application to the original purpose of the Indian reservation or even to unlimited uses for that purpose. Under the theory of immemorial rights, reserved Indian water rights would extend to industrial uses, potential energy development projects, and possibly even to wholesale distribution of reserved water rights off the reservation.

Indian water rights which would not be limited to agrarian purposes are of major economic importance to Indian and non-Indian water users. Vast coal reserves underlie many of the western Indian reservations. The Fort Berthold Reservation in North Dakota and the Fort Peck and Northern Cheyenne Reservations in Montana are completely underlain by coal-bearing rock. Other area reservation percentages include: Cheyenne River, 20%; Standing Rock, 33%; Blackfeet, 70%; Rocky Boy, 90%; Wind River, 40%; and Crow, 60%.[98] Large amounts of water would be necessary for the development of a coal industry on a reservation for the benefit of the tribe.[99] Diversion of water for industrial water service contracts and developing new energy supplies under the reservation doctrine would greatly diminish the amount of water available for state allocated domestic and irrigation uses.

Marketing Reserved Water Rights

The most controversial proposed use for reserved water rights is the marketing of reserved rights by the federal government or Indian tribes for off-reservation uses.[100] The sale or lease of In-

supra note 3, at 654-55 nn. 58-59, for an example of one scholar's view. *See also* Winters v. United States, 207 U.S. 564, 577 (1908), holding that: "The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be . . . . That the Government did reserve them we have decided, and for a use which would be necessarily continued through the years."

97. Veeder, *Indian Prior and Paramount Rights to the Use of Water*, 16 ROCKY MTN. MIN. L. INST. 631 (1971).

98. *Indian Water Rights: Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 94th Cong., 2d Sess. 98, table 1.1 (1976) (Initial Report, Daniel Old Elk, President, Native American Nat'l Resource Dev. Fed'n (NANRDF)).

99. *See* text accompanying note 2 *supra* (indicating the amounts of water needed for developing new energy sources).

100. For example, on February 24, 1975, the Secretaries of the Army and Interior entered into a Memorandum of Understanding concerning marketing of surplus water from six reservoirs on the main stem of the Missouri River. *See* Memorandum from Morris Thompson, Commissioner of Indian Affairs, to Rogers

dian waters has been characterized as the highest, best, or most profitable use of a valuable Indian resource.[101] However, permitting wholesale disposal of federal reserved water rights could conceivably result in total destruction of state water law schemes.[102] Allowing Indians unlimited quantities of water under *Winters* doctrine rights could result in upstream junior state water users, who presumed the state had vested water rights in them, paying the downstream senior water rights owners for long established uses.[103] No case law directly addresses the issue.

The courts have addressed alienation of Indian water rights primarily in the context of transfer of individual Indian allottee lands.[104] Section 7 of the General Allotment Act of

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C.B. Morton, Secretary of the Interior (Feb. 24, 1975). The purpose was to expedite plans for using large amounts of coal in the Dakotas, Montana, and Wyoming, for developing new energy supplies, and for permitting execution of industrial service contracts of approximately 1 million acre-feet of water designated for future irrigation use on Bureau of Reclamation projects. The irrigation projects were intended to serve both Indian and state users. The Memorandum provided that the Secretary of the Interior shall determine how much surplus water was available for sale for industrial contracts without benefit of state participation or input. Some of the contracts would require sale of state waters to industrial users in neighboring states. The Memorandum generated a great deal of concern among officials of western states. They feared this unilateral action by the federal government foreshadowed expansive government domination of unappropriated waters on federal installations, without federal consideration of state appropriation procedures and policies, and a sacrifice of local needs and benefits for national energy policies. *See* Veeder, *Water Rights in the Coal Fields of the Yellowstone River Basin*, 40 LAW & CONTEMP. PROB. 77 (Winter 1976); Comment, *Marketing of Surplus Water from Federal Reservoirs*, 13 LAND & WATER L. REV. 835 (1978).

101. Bloom, *Indian Paramount Rights to Water Use*, 16 ROCKY MTN. MIN. L. INST. 669, 691 (1971) (citing W. VEEDER, WINTERS DOCTRINE RIGHTS IN THE MISSOURI RIVER BASIN, MS. 1, 19 (1965)).

102. *Id.* The author comments: "[T]he ownership and exercise of a first right to an unlimited quantity of water in western streams by Indian Tribes outside the jurisdiction of state water officials would give rise to a chaotic situation."

103. In contrast, Professor Trelease, Dean of the University of Wyoming College of Law and noted water law authority, supports the recommendation of the Public Land Law Review Commission, that compensation be paid to state users whenever the utilization of the implied-reservation-of-water rights doctrine interferes with uses vested under state laws prior to the 1963 *Arizona v. California* decision. Citing the compensation provisions of the 1902 Reclamation Act and the 1920 Federal Power Act, the Commission found no reason for a different policy involving public land programs. As a matter of fairness and equity, the Commission found it appropriate to compensate holders of vested state water rights, whose uses are curtailed through federal reliance on the implied-reservation-of-water rights doctrine, expressing the belief that potential costs to the government would be relatively low. *See* Trelease, *Water Resources on the Public Lands PLLRC's Solution to the Reservation Doctrine*, 6 LAND & WATER L. REV. 89, 98-99 (1970).

104. An allottee is a member of the tribe holding title to reservation lands who

1887[105] provides:

> In cases where the use of land for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservation . . . .[106]

Indian rights advocates argue that the General Allotment Act does not partition the water, but rather that the Act allots only a use right, retaining common ownership of the actual *Winters* doctrine right in the tribe. However, in *United States v. Powers*,[107] the Supreme Court held that

> under the Treaty of 1868 waters within the Reservation were reserved for the equal benefit of the tribal members . . . and that when allotments of land were duly made for exclusive use and thereafter conveyed in fee, the right to use some portion of the tribal waters essential for cultivation passed to the owners.[108]

Thus, when a reservation is allotted, the *Winters* doctrine rights pass to the allottee and become appurtenant to the allotted land. The *Powers* Court, however, did not rule on the extent or precise nature of the rights which passed to the allottees.[109] Defining the exact nature of the appurtenant water right is critical where Indian allottees sell their land to non-Indian parties.[110]

In *United States v. Ahtanum Irrigation District*,[111] the Ninth Circuit held that transferees of fee patented Indian allotments acquire a vested water right interest upon acquisition of the allot-

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receives a fee patented title pursuant to the Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388, as amended 25 U.S.C. §§ 331-34, 339, 341-42, 348-49, 354, 381 (1976).

105. *Id.*

106. 25 U.S.C. § 381 (1976).

107. 305 U.S. 528 (1939).

108. *Id.* at 532.

109. *Id.* at 533.

110. *See* G. HALL, THE FEDERAL-INDIAN TRUST RELATIONSHIP 91 app. E (1979), listing the percentages of allotted tribal trust lands on all reservations in the United States. In some cases 100% of the tribal lands have been allotted under the General Allotment Act. Much of the allotted land has now passed to non-Indian owners, largely as a result of the problems associated with heirship. State laws of descent and partition apply to allotments, 25 U.S.C. § 348 (1976). About half of the allotted land in heirship status is owned by six or more heirs, fractionalizing the ownership to such an extent that a reasonable economic return is not achievable for farming and ranching purposes. Any one of the heirs is generally unable to afford to purchase the land from other heirs, so the allotment is placed on the market for sale. Indians have historically been less than successful at obtaining commercial credit for land purchases, and Bureau of Indian Affairs credit programs are minimal. The result is a continual transfer of Indian allotted lands to non-Indian owners, reducing the tribal land base. *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 216-17 (1945). *See also* Williams, *Too Little Land, Too Many Heirs—The Indian Heirship Land Problem*, 46 WASH. L. REV. 709, 712-19 (1971).

111. 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957), *rev'd*, 330 F.2d 897 (9th Cir. 1964), *rehearing denied*, 338 F.2d 307 (9th Cir. 1964), *cert. denied*, 381 U.S. 924 (1965).

ment. The vested right of the transferee is identical to rights of original allottees, including a priority date relating back to the original date of the reservation.[112] Thus, the non-Indian allottees are beyond the scope of the state statutory appropriation schemes. Adopting the view of the *Ahtanum* court would permit expansion of the transferee's use right along with other Indian reserved water rights. In an earlier case, however, *United States v. Hibner*,[113] an Idaho district court had limited the use right of successors in interest, holding:

> [T]he white man, as soon as he becomes the owner of the Indian lands, is subject to those general rules of law governing the appropriation and use of the public waters of the state, and would, as grantee of the Indian allotments, be entitled to a water right for the actual acreage that was under irrigation at the time title passed . . . .[114]

The *Hibner* court gave the non-Indian successor a limited water right with a priority date of reservation establishment. The court did not give him a full-fledged *Winters* doctrine right, however, or exclude the successor from the application of state law. The *Hibner* decision seems to be a more equitable solution. It confines the expanded *Winters* doctrine right to the persons it was intended to benefit and eliminates the removal of a small number of non-Indian state citizens from the jurisdiction of state water laws.[115]

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112. *Id.* at 342.

113. 27 F.2d 909 (E.D. Idaho 1928).

114. *Id.* at 912.

115. Since this Comment was accepted for publication, the United States Court of Appeals for the Ninth Circuit has held that all water rights are excluded when Indian land is acquired by non-Indians. *See* Colville Confederated Tribes v. Walton, 80 Daily Journal D.A.R. 2440 (9th Cir. Aug. 20, 1980). The court concluded that Walton acquired no reserved water rights with his allotment for two reasons: 1) no water was originally reserved for non-Indian use and 2) the history and purpose of the Allotment Act demonstrated that Congress would not have intended non-Indians to acquire reserved rights. The Ninth Circuit based its conclusion on United States v. New Mexico, 438 U.S. 696 (1978), which mandates that reserved rights be narrowly construed to include a reservation of sufficient waters to fulfill the original purposes of the reservation and no more. Since the original purpose of the reservation in this instance was to "isolate the Indians, to establish them in a homeland, and to convert them to a 'pastoral and civilized people,'" reserving water for non-Indian owners would not fulfill these purposes and "be inconsistent with the basic nineteenth century Indian policy of isolation." 80 Daily Journal D.A.R. at 2440. In addition, the court felt that Congress would have disapproved the transferability of the reserved right as inconsistent with the Allotment Act. The court projected that transferring the reserved right would encourage non-Indians to purchase allotments and would enable the Indians to sell their allotments at higher prices, further encouraging alienation of the Indian land base, in derogation of the dominant purpose of the Act—permitting Indian fee ownership of land

Absent Supreme Court determination, the issue of alienation and marketing of reserved water rights remains open. Whether or not the Court would greatly expand tribal *Winters* doctrine rights even after a tribe had disposed of much of their allotted lands and appurtenant water rights remains undetermined. In addition, whether the Indians may enter the realm of marketing reserved water rights for off reservation uses remains to be decided.

Recommendations for Quantifying Reserved Water Rights

In view of the trend of the Supreme Court to limit reserved rights to original purposes to avoid excessive interference with established state uses, wholesale marketing of reserved rights is beyond the normal interpretation of original purposes. Under principles of equity, it would be inconsistent for the Court to allow expansive *Winters* doctrine rights to divest established state uses, considered to have vested under state laws, without compensation. A better view would be to limit proposed marketing of reserved water rights to any available, unappropriated waters, in compliance with state appropriation schemes. Priority of the right should be from the date of initiation and should not relate back to the original date of the reservation.

All reserved water claims should be based on the original purposes of the reservation. A universal standard of quantification is impractical because of the diverse purposes for which land is reserved.[116] However, after determining the purpose of the reservation, the court should superimpose a requirement of reasonable use and need. Should the present uses of a reservation appear to be inadequate because of retarded economic growth or other factors, the court could include reasonably foreseeable demands in the decree. Permanently quantifying reserved water rights based on present use and needs would secure non-Indian water rights from future preemption, a danger inherent in any open-ended approach. The Indians and the federal reserved land administrators would also be assured of a definite quantity of water, safe from encroachment by state water users. Increased federal or Indian water needs could be met through compliance with state appropriation laws and limited to unappropriated, surplus waters in the watershed. In areas where streams are fully appropriated, the doctrine of eminent domain is available to ensure the unimpeded

so that they could make their homes on it and become self-sufficient farmers. *Id.* at 2440-41. To permit non-Indian acquisition of the better, reserved water right would be inconsistent with both the intent of the Act and the original purposes of the reservation. Hence, the non-Indian water rights are solely state created and are, therefore, junior to any Indian right.

116. *See* note 63 and accompanying text *supra.*

development of Indian and federal interests, while still protecting the investments of established users.[117]

COLLATERAL PROBLEMS ENCOUNTERED IN ADJUDICATING RESERVED RIGHTS

The Federal Trust Doctrine and the Interagency Conflict of Interest in Adjudicating Reserved Water Rights

Over a hundred years ago the Supreme Court described the relationship between the United States and Indian tribes as being so unique that nothing like it existed anywhere else in the world.[118] This unique legal and political association has sometimes been referred to as a "guardian-ward" or fiduciary relationship. The trustee for the federal-Indian trust relationship is the United States Congress. Congress has been held to have "plenary power" over the Indians.[119] It is the only branch of the United States Government that has the legal power to change the nature or scope of the federal obligation under the trust. Congress can even abrogate treaty rights unilaterally.[120]

Although Congress sets the policy to carry out the trusteeship, the Department of Interior executes the trust through the Bureau of Indian Affairs. The Department of Interior also administers much of this nation's public lands under the jurisdiction of agencies such as the Bureau of Land Management, the Bureau of Mines, the Bureau of Reclamation, and the National Park Service. If the Department attempts to protect Indian reserved rights which conflict with those of a sister agency, an irreconcilable conflict of interest exists within the Department. For example, in *Pyramid Lake Paiute Tribe v. Morton*[121] the Secretary of the Interior's duty to protect the tribe's reserved water rights conflicted with the simultaneous duty to execute upstream water delivery contracts under the administration of the Bureau of Reclamation. The Department of Justice faces the same conflicts of interest. The Justice Department must represent the United States in all

117. For a discussion of the federal sovereign's power of eminent domain, see Sotebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553 (1972).

118. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831). Justice Marshall's opinion stressed that Indian tribes were not foreign nations, but rather, "domestic dependent nations."

119. Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903).

120. *Id.* at 565-66.

121. 354 F. Supp. 252 (D.D.C. 1973).

suits to which the United States is a party.[122] The Justice Department is frequently placed in the dubious position of simultaneously representing client-agencies whose interests are in direct opposition.

Government officials have acknowledged the conflict of interest,[123] but claim they are nevertheless fully committed to fulfillment of their fiduciary duty to the Indians.[124] However, in the past the federal government has been less than conscientious about enforcing Indian water rights. For example, in 1905 the Bureau of Reclamation constructed a dam on the Truckee River ten miles above Pyramid Lake. The upstream diversions dropped the lake surface level more than seventy feet and destroyed the spawning grounds of the lake's indigenous fish population. The lake's natural fishery is intimately tied to the livelihood of the Pyramid Lake Paiutes, and the lake itself holds much cultural and religious meaning for the tribe. The interests of the Bureau of Reclamation and the Bureau of Indian Affairs were in direct competition. The tribe exhausted all of its administrative remedies in trying to force the Department of Interior to exert Indian water rights claims on their behalf against the Bureau of Reclamation and other upstream users. In 1970, the tribe sued for a declaration of rights and an affirmative injunction against the Secretary of the Department of Interior with respect to the upstream water diversions by the Bureau of Reclamation.[125] The district court upheld the tribe's claims, holding that the Secretary's conduct was in violation of his fiduciary obligation.[126] Compelled to uphold its

122. 28 U.S.C. § 516 (1976).

123. *See* President Nixon's Message on American Indians (July 8, 1970), *quoted in* M. PRICE, LAW AND THE AMERICAN INDIAN 597, 601 (1973).

> [E]very trustee has a legal obligation to advance the interests of the beneficiaries of the trust without reservation and with the highest degree of diligence and skill. Under present conditions, it is often difficult for the Department of the Interior and the Department of Justice to fulfill this obligation. No self-respecting law firm would ever allow itself to represent two opposing clients in one dispute; yet the federal government has frequently found itself in precisely that position. There is considerable evidence that the Indians are the losers when such situations arise. More than that, the credibility of the federal government is damaged whenever it appears that such a conflict of interests exists.

124. *See* Address by Leo M. Krulitz, Solicitor, Department of the Interior, to the Federal Bar Association (April 21, 1977), Phoenix, Arizona, *quoted in* G. HALL, THE FEDERAL-INDIAN TRUST RELATIONSHIP 32-33 (1979). Solicitor Krulitz stated: "President Carter, Secretary Cecil Andrus, and I are fully conscious of the federal government's trust responsibilities to Native Americans. We are intent upon seeing those responsibilities fulfilled." *See also American Indian Policy Review Commission's Management Study of the B.I.A.: Hearings Before the Senate Select Committee on Indian Affairs*, 15th Cong., 1st Sess. (1977) (statement of James A. Joseph, Under Secretary, Department of the Interior).

125. Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252 (D.D.C. 1973).

126. *Id.* at 255-56.

fiduciary duty, the Justice Department filed suit in United States District Court in Nevada, seeking adjudication of tribal and federal reserved water rights throughout the Truckee River drainage.[127] Named as defendants were some 20,000 water users. Although the Paiute Tribe won a major victory against the Secretary of the Interior, over $212,395 was expended by the tribe in the action. The tribe was denied court and attorney fees on appeal by the government.[128] In addition, the Department of Justice will continue to represent tribal claims along with those of the Bureau of Reclamation in the upcoming suit.[129]

In cases in which there are conflicts of interest, Indians have the right to employ private counsel.[130] However, when choosing this alternative, the tribe must fund the litigation privately, as opposed to receiving federal funding from the Departments of Justice and Interior. In the Pyramid Lake controversy, the Bureau of Indian Affairs has expended over two million dollars alone in preparing complex environmental studies in anticipation of the litigation.[131] The availability of federal fiscal resources for adjudicating and protecting Indian water rights and recent attempts to minimize internal conflicts of interest[132] indicate that the better choice is to continue to seek federal assistance and representation in protecting tribal water rights. If tribal water rights were perma-

127. United States v. Truckee Carson Irrigation Dist., 71 F.R.D. 10 (D. Nev. 1975), Civ. No. R-2987-JBA (D. Nev., filed Dec. 21, 1973).

128. Pyramid Lake Paiute Tribe v. Morton, 499 F.2d 1095 (1974).

129. The Department of Justice has attempted to minimize this conflict of interest, however, by creating an Indian Resources Section in the Lands Division of the Attorney General's Office. The section contains a cadre of attorneys whose sole focus is on matters involving the fiduciary responsibility of the United States to Indian tribes. At present, litigation under the auspices of this section primarily concerns water rights, hunting and fishing rights, and rights to self-government. *See Indian Water Rights: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary,* 94th Cong., 2d Sess. 9 (1976) (statement of Peter R. Taft, Assistant Attorney General).

130. New Mexico v. Aamodt, 537 F.2d 1102, 1106-07 (10th Cir. 1976).

131. *See Indian Water Rights: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary,* 94th Cong., 2d Sess. 15 (1976) (statement of Hon. Reid P. Chambers, Associate Solicitor, Department of the Interior). Mr. Chambers indicated that preparation of water rights cases requires complex water inventories. Quantification of water rights requires preparation of stream flow studies and detailed soil classification studies of reservation lands, with attention to such characteristics as texture, slope, alkalinity, and topsoil depth. In addition, a detailed study of the history and culture of the tribe is often pertinent when tribes seek to preserve waters for cultural or religious reasons.

132. *See* text accompanying note 129 *supra.*

nently quantified, the need for independent tribal actions to determine reserved water rights would be alleviated.

Conflicts Between Reserved Rights and State Statutory Schemes

Western Water Laws

From the state's perspective, the significance of the implied-reservation-of-water rights doctrine may be more fully appreciated by an understanding of basic western water law. Deviating from the common law doctrine of riparian rights,[133] western water law is largely an outgrowth of territorial mining activities. To preserve peace in the mining fields, the miners created their own customs, usages, and regulations. The individual who made the first use of available water had priority over all other claimants to as much of the water as was applied to a beneficial use.[134] The custom became known as the doctrine of prior appropriation[135] and developed largely to protect monetary investments of established beneficial users.[136] Once waters had been fully appropriated, new users could not divert water upstream and deprive a miner of his established uses. The first user could appropriate all of the water in any stream, as long as he applied it to a beneficial use.[137] Moreover, in times of shortage, a senior appropriator's rights were satisfied in full before a junior appropriator could assert any part of his share.[138]

133. The common law doctrine of riparian rights provides that the right to the use of water belongs to those who have access to it through ownership of land. It denies water rights to any landowner whose property does not abut upon a stream, irrespective of need or purpose. 1 S. WEIL, WATER RIGHTS IN THE WESTERN STATES 748-50 (3d ed. 1911).

134. The miners established essentially the same rules for ownership of mining claims and the right to use of water. The discovering miner was protected against all who tried to jump his claim. Similarly, the first user of water was protected against later takers. *Id.* at 72-74.

135. The Supreme Court in Arizona v. California, 283 U.S. 423, 459 (1931), defined the doctrine as follows:

> To appropriate water means to take and divert a specified quantity thereof and put it to beneficial use in accordance with the laws of the State where such water is found, and, by so doing, to acquire under such laws, a vested right to take and divert . . . the same quantity of water annually forever, subject only to the right of prior appropriations.

136. The doctrine was cognizant of the existing social and political climate, protecting the rights of miners, who by prior appropriation had taken water from the natural beds and transported it for miles over mountains and ravines to supply water to gold diggers. *See* Trelease, *Arizona v. California: Allocation of Water Resources to People, States, and Nation*, 1963 SUP. CT. REV. 158, 185.

137. *See generally* Jennison v. Kirk, 98 U.S. 453, 457-58 (1879).

138. The rule of prior appropriation is not so harsh as it would appear. Subsequent reapportionment of available water among users as they entered the area would eventually result in insufficient waters to allow anyone to prosper. As such, junior water appropriators were encouraged to develop alternate ground water sources, build dams to store flood and rain waters, transport water from greater

In 1866, Congress acknowledged the custom by passing legislation declaring that water rights on public lands would be governed by local customs, not by common law.[139] Further, the Desert Land Act of 1877[140] authorized the "appropriation" of surplus water on the nation's public lands pursuant to state and territorial laws. All western states have adopted some form of the doctrine of prior appropriation.[141]

The current federal reserved water rights law conflicts with nearly every element of state appropriation schemes. State appropriation claims are considered to vest under state law whenever a specific quantum of water has actually been diverted from the stream and put to beneficial use.[142] Priorities are assigned with first in time being first in right.[143] Water rights obtained under state laws may be sold or transferred,[144] but are forfeited by nonuse.[145] Contravening the western water laws, *Winters* doc-

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distances, or purchase water rights from senior appropriators. Trelease, *Water Rights of Various Levels of Government—States' Right vs. National Powers*, 19 WYO. L.J. 189, 194-95 (1966).

139. Act of July 26, 1866, ch. 262, § 9, 14 Stat. 151, 253 (codified at 43 U.S.C. § 661 (1976)). Section 9 provides in part:

> [W]henever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed.

See also Act of July 9, 1870, ch. 235, § 17, 16 Stat. 217, 218 (codified at 43 U.S.C. § 661 (1976)), amending the Act of 1866, extending its effect to all public lands. All future settlements of public lands were to be subject to any vested and accrued water rights as acquired by prior appropriation.

140. Act of March 3, 1877, ch. 107, 19 Stat. 377 (codified in part at 43 U.S.C. § 321 (1976)), states that one claiming water for the desert land entry must "depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation."

141. The western states include Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming. For a comprehensive review of state water laws, see A SUMMARY—DIGEST OF STATE WATER LAWS (R. Dewsnup & D. Jensen eds. 1973).

142. *See* Reno v. Richards, 32 Idaho 1, 178 P. 81 (1918); Huffine v. Miller, 74 Mont. 50, 237 P. 1103 (1925); *In re* Waters of Manse Spring, 60 Nev. 280, 108 P.2d 311 (1940); Tanner v. Provo Reservoir Co., 99 Utah 139, 98 P.2d 695 (1940).

143. Veeder, *Water Rights in the Coal Fields of the Yellowstone River Basin*, 40 LAW & CONTEMP. PROB. 77, 82 (Winter 1976).

144. Mt. Carmel Fruit Co. v. Webster, 140 Cal. 183, 73 P. 826 (1903).

145. *See* Smith v. Hawkins, 110 Cal. 122, 42 P. 453 (1895) (failure to use water for a five year period constitutes statutory forfeiture of appropriated rights); *See also*

trine rights are not dependent upon beneficial use. The right is for an unspecified quantum of water with a priority date of the creation of the reservation.[146]

This indefinite quantity of reserved federal water rights presents the greatest conflict between the two doctrines. It is difficult for state officials to coordinate federal reserved water claims with state water laws, administration, and planning. Owners of privately held water rights are subject to having their established uses diminished or impaired without compensation whenever reserved rights are exercised on heavily appropriated streams.[147] State users, who rely upon state water laws to "vest" their water rights, oppose the doctrine and the government's ability to take their water without notice or compensation. State appropriation rights often date from the late 1800s, and many streams were fully appropriated under the state law by the turn of the century.[148] Yet, these approved appropriations may be reduced or eliminated at any time by the exercise of new, reserved water rights.

In the past, federal reserved claims were minimal and did not unduly hamper state water administration or planning. In addition, many federal agencies voluntarily complied with state appropriation laws.[149] States could determine with a reasonable degree of certainty the quantum of water available for state uses. Forfeiture of waters not applied to beneficial uses or the sale of senior appropriation rights often assured available waters for new users. More recently, however, the *Winters* doctrine has received renewed vitality, sharply competing with increasing state needs. In the wake of *Pyramid Lake Paiute Tribe v. Morton*,[150] the Department of Justice has stepped up its efforts to adjudicate and pro-

Scott v. Temple, 108 Colo. 463, 119 P.2d 607 (1941) (abandonment); *In re* Drainage Area of Bear River, 12 Utah 2d 1, 361 P.2d 407 (1961) (abandonment); 1 S. WEIL, WATER RIGHTS IN THE WESTERN STATES 603-622 (3d ed. 1911); Comment, *Water Rights—Failure to Use—Forfeiture*, 6 NAT. RESOURCES J. 127 (1966).

146. Arizona v. California, 373 U.S. 546, 600 (1963).

147. Generally, Indian rights pre-date most state water rights, being given a priority date from the time of the reservation's creation. All Indian treaties were negotiated prior to 1871, when Congress passed legislation which brought treaty making with the tribes to an end. 25 U.S.C. § 71 (1976). The Act declared that no Indian tribe was to be acknowledged as an independent nation with whom the United States could contract by treaty. The legislation did not, however, impair the validity of existing treaties. Whenever new reserved rights are exercised, they relate back to the original date of the reservation, divesting any later dated claim, without compensation, no matter how long it may have been in use. For example, an Indian reservation established in 1855, which commences its first use of water in 1979, has a right to receive water ahead of any non-Indian water rights with a priority date after 1855.

148. Palma II, *Indian Water Rights: A State Perspective After Akin*, 57 NEB. L. REV. 295, 297-98 (1978).

149. *See* Ranquist, *supra* note 3, at 677-84.

150. 354 F. Supp. 252 (D.D.C. 1973).

tect both Indian and other federal reserved water rights.[151] The suits have substantial implications for the states and thousands of private users named as defendants.[152] All claims are adverse and every defendant, including in some cases those using water only for domestic purposes, must retain an attorney and personally defend his water rights. States, cities, and owners of privately held water rights are overwhelmed by the financial implications of such a suit. Under severe fiscal restraints, they are incapable of matching their federal opponent's financial capacity to seek judicial protection of water rights. In addition, water rights suits are notoriously lengthy and expensive, some continuing for over fifty years.[153]

151. For example, in April 1979, major lawsuits were filed on four drainages in Montana: the Flathead, Poplar, Milk, and Marias. In addition, litigation is pending on two additional drainages in Montana—the Tongue and Bighorn Rivers. The scope of the suits is staggering. On the Flathead Drainage, for example, Indian water rights are placed in the battle arena with such federal interests as a national park; two national forests; a national bison range; three wildlife refuges; a national fish hatchery; portions of the Flathead River designated as a "Wild and Scenic River" under the 1968 Act; power plant installations on federal lands; power plant sites on Indian reservations; irrigation projects; and military bases. Named as defendants, along with the state, are upstream state private water users. The defendants are primarily small towns, farmers, and seasonal recreational facilities. The suit encompasses surface and ground water users. Many are not major water users and in fact draw upon domestic wells only for household uses or use "catch basin reservoirs" for stockwatering. Many others are located several miles from the river or any of its tributaries. United States v. Abell, Civ. No. 79-33M (D. Mont., filed April 5, 1979), *appeal docketed*, No. 80-3038 (9th Cir. Jan. 25, 1980).

In a joint dismissal order dated November 29, 1979, United States District Court Judges James F. Battin and Paul G. Hatfield dismissed all seven water suits pending in federal courts in the state of Montana. Notice of appeal was filed by the United States Government with the Court of Appeals for the Ninth Circuit, January 25, 1980.

152. *E.g.*, United States v. City of Tucson, Civ. No. 75-39 TUC (JAW) (D. Ariz., order entered October 16, 1975). The Federal District Court of Arizona ordered joinder of all surface and ground water users in the Upper Santa Cruz River Basin, consolidating suits brought by the Papago Tribe and the United States on the tribe's behalf. The suit currently includes over 100,000 defendants and seeks to enjoin the city of Tucson and other state water users from mining ground water underlying the reservation.

153. *E.g.*, United States v. Alpine Land and Reservoir Co., Equity No. D-183 (D. Nev., filed May 11, 1925) is still pending. Another example is United States v. Orr Water Ditch Co., Equity No. A-3 (D. Nev., Sept. 8, 1944) which was filed on March 3, 1913; the stipulated decree entered in that case is the subject of a current suit, United States v. Truckee Carson Irrigation District, Civ. No. R-2987-JBA (D. Nev., filed Dec. 21, 1973), because the court failed to consider a reserved water right in the Truckee River for the preservation of Pyramid Lake and its fishery.

The Source of Authority for Federal and State Water Administrative Powers

Many states have asserted in their constitutions or by statute that the waters of all natural streams, unappropriated by prior users, are the property of the public and remain subject to appropriation as provided by state laws.[154] However, the power of the states to claim proprietorship of state waters must arise, if at all, from the tenth amendment to the United States Constitution.[155]

A state's right to establish laws for the administration and distribution of waters within its borders has long been recognized by the Supreme Court.[156] Moreover, the states assert that Congress intended to allocate the ownership of water rights and the authority to control and administer water rights to the states pursuant to statutory provisions enacted at the turn of the century.[157] The states have traditionally administered and apportioned their state waters without substantial federal interference for the past century. Even the Reclamation Act of 1902[158] carried forward the policy of recognizing the state and territorial laws as the sources of water rights, clearly providing that state water law would control the appropriation and later distribution of the water.[159]

Historically, it has been the policy of the federal government to

154. *See, e.g.*, MONT. CONST. art. 3, § 15. *See also* WYO. CONST. art. 8, § 1, which provides: "The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state."

155. U.S. CONST. amend. X, which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

156. *E.g.*, California Ore. Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 163 (1935), holding that "all non-navigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states." *Accord*, Connecticut v. Massachusetts, 282 U.S. 660, 670 (1931); Wyoming v. Colorado, 259 U.S. 419, 465 (1922); Kansas v. Colorado, 206 U.S. 46, 94 (1907); United States v. Rio Grande Irrigation Co., 174 U.S. 690, 702-03 (1899).

157. *See* notes 139-140 *supra* and accompanying text.

158. Act of June 17, 1902, ch. 1093, 32 Stat. 389 (codified at 43 U.S.C. §§ 372-73, 381, 383, 391, 392, 411, 416, 419, 421, 431, 432, 434, 439, 461, 491, 498). 43 U.S.C. § 383 provides:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws . . . .

159. From the legislative history of the Reclamation Act, it is clear that state law was expected to control the distribution of waters from federal projects. Representative Mondell, the principal sponsor of the Reclamation Bill in the House, indicated that the "bill provides explicitly that even an appropriation of water cannot be made except under state law." 35 CONG. REC. 6687 (1902). Further, Senator Clark, one of the principal supporters of the bill in the Senate, explained that "the

encourage development of water resources by state water users, even in drainage basins subject to reserved rights.[160] With full knowledge of its own reserved rights and its position as trustee for the Indian reserved rights, the federal government nevertheless encouraged and frequently funded water resource development projects on streams subject to reserved water claims. The states assert that the government's conduct implied that private and state developments on those streams were proper and would be secure.[161] Based upon that representation, the states claim that the government should be estopped from now exercising greatly magnified reserved claims without protecting the encouraged uses.[162]

Despite past congressional deference to state water laws, the

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control of the waters after leaving the reservoirs shall be vested in the States and Territories through which such waters flow." *Id.* at 2222.

The Supreme Court recognized this Congressional intent in Nebraska v. Wyoming, 325 U.S. 589, 614 (1945), holding that, "[a]lthough the government diverted, stored, and distributed the water, the . . . ownership of the water or water-rights [did not become] vested in the United States. . . . The government was and remained simply a carrier and distributor of the water. . . ." *But cf.* Arizona v. California, 373 U.S. 546 (1963), where the Supreme Court interpreted § 8 as not requiring the United States, in the delivery of water, to follow priorities laid down by state law; and the Secretary was not bound by state law, in disposing of water under the Project Act. *Id.* at 586-87. Further, the Court held that the United States intended to reserve enough water for the future requirements of Lake Mead National Recreation Area, a reservoir created by the Boulder Dam Project, under the broad powers of the government to regulate navigable waters under the commerce clause and the property clause, basing its decision on dicta in Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275 (1958), and City of Fresno v. California, 373 U.S. 627 (1963). The dicta in *Ivanhoe* and *City of Fresno* were disavowed, however, by the Supreme Court in California v. United States, 438 U.S. 645 (1978), holding that under the 1902 Reclamation Act, the Secretary of the Interior must follow state law as to the appropriation of water and condemnation of water rights.

160. For example, the United States entered into a contract with the Metropolitan Water District of Southern California in 1933 for the construction and operation of Parker Dam as the diversion point for the Colorado River Aqueduct. The project was built at a cost in excess of $200 million. The Parker Dam Project was authorized by the Act of August 30, 1935, Pub. L. No. 409, § 2, 49 Stat. 1028, 1039. Congress was aware of Indian claims on the Colorado River at the time the project was approved. The tribal claims were later quantified at one million acre-feet in Arizona v. California, 373 U.S. 546 (1963), *decree*, 376 U.S. 340 (1964). Should the one million acre-feet be fully utilized by the tribes, the supply to the Aqueduct would be nearly eliminated. NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE 481 (1973).

161. NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE 481 (1973).

162. For example, in Broder v. Natoma Water & Mining Co., 101 U.S. 274, 276 (1880), the Court observed that local appropriation rights were "rights which the government had by its conduct, recognized and encouraged and was bound to protect."

judiciary has recognized limitations on a state's right to control waters within its boundaries.[163] The federal right to preempt state regulatory controls resides in the United States Constitution. As such, federal regulatory powers are supreme, and the federal government can perform these functions without interference or impediment by the states.[164] The basis for federal reserved rights claims largely rests on the property clause of the Constitution.[165] Because the federal government originally had control over all the territorial lands by virtue of its sovereignty, it has plenary power to control the property within the United States, including public and reserved lands.

The federal government also supports the reserved water rights doctrine on the basis of the commerce clause[166] and the navigational servitude.[167] In addition, the war[168] and treaty[169] powers of the United States Constitution give the federal government authority to build projects that will strengthen the national defense or comply with a treaty. Even the general welfare clause[170] has

163. United States v. Rio Grande Irrigation Co., 174 U.S. 690, 703 (1899), holding that:

> Although this power . . . as to streams within its dominion undoubtedly belongs to each State, yet two limitations must be recognized: First, that in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property. Second, that it is limited by the superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States.

164. U.S. CONST. art. VI, "This Constitution, and the laws of the United States . . . and all treaties . . . shall be the supreme law of the land . . . ."

165. *Id.* art. IV, § 3, "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. . . ."

166. *Id.* art. I, § 8, "The Congress shall have power . . . [t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes . . . ."

167. The navigational servitude is a court-created incident of the constitutional power to regulate commerce. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 190 (1824). Navigable waters in the United States are defined as "those waters that . . . are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." 33 C.F.R. § 329.4 (1979).

168. U.S. CONST. art. I, § 8. Although the war power has not been used to bring large scale projects in conflict with state laws, the court noted in Nevada v. United States, 165 F. Supp. 600 (D. Nev. 1958), that if the United States needed water for national defense installations on the public domain, it need not "bend its knee" and comply with state water laws that might interfere with the management of property in the best interest of national defense.

169. U.S. CONST. art. II, § 2. *E.g.*, 59 Stat. 1219 (1944); Colorado River Compact art. III (c) (1922), guaranteeing Mexico a specific quantity of water from the Colorado River, must be kept to meet the nation's obligations, even though it may require curtailment of state water uses.

170. U.S. CONST. art. I, § 8, "The Congress shall have power . . . to pay the

been used to sustain federal power over western waters.[171] Armed with the United States Constitution, the federal government is a formidable opponent for anyone seeking to assert water rights. It appears to have almost unlimited jurisdiction over waters whenever a national or federal interest arises.[172] However, federal supremacy need not require disruption of state water systems and seizing of established uses without compensation.[173] Coexistence of federally created water rights and state created water rights for private and public purposes is achievable.[174] Since 1955, there have been numerous legislative proposals attempting to clarify the federal-state relationship over control of western waters, but none has passed.[175] Without a congressional solution to the western water problem, states are subject solely to the frequently inconsistent judicial interpretations of the re-

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debts and provide for the common defense and general welfare of the United States . . . ."

171. The famous case of United States v. Gerlack Livestock Co., 339 U.S. 725 (1950), held that one of the largest federal basin-wide development projects, the Central Valley Project in California, was constitutional under the general welfare and taxing clauses of the Constitution.

> [C]ongress has a substantive power to tax and appropriate for the general welfare, limited only by the requirement that it shall be exercised for the common benefit as distinguished from some mere local purpose. . . . Thus the power of Congress to promote the general welfare through large-scale projects for reclamation, irrigation, or other internal improvements is now . . . clear . . . .

Id. at 738.

172. Trelease, *Federal Limitations on State Water Laws*, 10 BUFFALO L. REV. 399, 424 (1961).

173. NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE 469 (1973). The National Water Commission was extremely critical of the federal ability to seize established state water uses without compensating the individuals, stating "[c]onsiderations of fairness, accommodation and comity require that the United States, whenever possible, acquire water rights and not just take water."

174. Trelease has concluded that the doctrine of reserved rights is entirely a fiscal doctrine, asserting that the only significant function of a reserved water right is to avoid payment of compensation for vested state water rights. Taking this view, the efficacy of the entire doctrine is questionable. The costs of naming hundreds of thousands of state water users as defendants in complex litigation will undoubtedly exceed costs of eminent domain proceedings on a case-by-case basis, whenever increased reserved rights are needed. Further, meshing of federal and state water laws could be more easily accomplished using negotiation processes, rather than lengthy litigation. *See* F. TRELEASE, FEDERAL-STATE RELATIONS IN WATER LAW, NATIONAL WATER COMMISSION LEGAL STUDY NO. 5 147a-m (1971). *See also* Corker, *Federal-State Relations in Water Rights Adjudication and Administration*, 17 ROCKY MTN. MIN. L. INST. 579 (1972).

175. *See* Morreale, *Federal-State Conflicts over Western Waters—A Decade of Attempted "Clarifying Legislation,"* 20 RUTGERS L. REV. 423, 423 (1966).

served water rights doctrine.[176]

As the federal government begins to assert sweeping claims to western waters, the conflict between state laws and the reserved water rights doctrine becomes more critical. Acknowledging the federal-state conflict over American water resources, President Carter announced his Federal Water Policy Initiatives[177] on June 6, 1978. Part three of the four-part proposal addressed the improvement of federal-state cooperation and state resources planning.[178] President Carter expressed the belief that the federal government should not preempt the states' responsibility for water management and allocation because of the diversified role of water throughout the United States.[179] Although proposing an increased role and responsibility in water resources development by the states,[180] President Carter recognized that states are unable to allocate water in areas where reserved water rights have not been determined.[181] Federal agencies have been ordered to establish and quantify federal and Indian reserved water rights through administrative means such as negotiation, using formal adjudication as a last resort.[182] Seeking adjudication of federal and Indian reserved water rights in the courts on a wide scale is contrary to the stated objective of pursuing administrative solutions.[183] Complex litigation prevents the states from complying with the Initiatives' directive to increase state control and responsibility in the management of state waters. Yet, states will be unable to begin comprehensive management of state waters as long as federal and Indian claims remain unquantified.

SUMMARY OF RECOMMENDATIONS

Legislative Solutions

To date, judicial determination has been the sole mechanism for resolution of water rights conflicts involving reserved and

176. For a critical review of the reserved water rights doctrine as federal common law and its erratic and confusing application by the Supreme Court, see Grow & Stewart, *The Winters Doctrine as Federal Common Law*, 10 NAT. RESOURCES LAW. 457 (1977-78).

177. H.R. DOC. NO. 95-347, 95th Cong., 2d Sess. (1978).

178. *Id.* For a full discussion of the water policy initiatives, see Comment, *President Carter Announces Water Policy Initiatives*, 19 NAT. RESOURCES J. 191 (1979).

179. H.R. DOC. NO. 95-347, 95th Cong., 2d Sess. 2 (1978).

180. *Id.* at 6.

181. *Id.* at 7. *See also* ENVIRONMENT AND NATURAL RESOURCES POLICY DIVISION, CONGRESSIONAL RESEARCH SERVICE, ANALYSIS OF THE PRESIDENT'S WATER POLICY INITIATIVES 27 (1978).

182. H.R. DOC. NO. 95-347, 95th Cong., 2d Sess. 7 (1978).

183. *See, e.g.*, note 151 *supra.*

state water rights.[184] The system is expensive, inefficient, and frequently inconclusive.[185] Congress has at various times funded major studies and created commissions to review the problem, but has failed to act upon any of the recommendations.[186] To achieve a complete resolution of the conflict, Congress must take the initiative and pass legislation that would: (1) limit all reserved water claims to reasonable present needs and uses; (2) provide an administrative mechanism for permanently determining the reserved water rights in cooperation with comprehensive state water administration systems; (3) provide that whenever a reservation is withdrawn from the public domain in the future, water requirements would be expressly reserved and limited to any unappropriated surplus waters; (4) provide that future federal and Indian water needs should be met by compliance with state appropriation schemes and limited to unappropriated surplus waters in the watershed or obtained through the power of eminent domain; (5) provide under equitable considerations that compensation be awarded whenever federal and Indian water needs preempt established state uses. Application of these recommendations would remove the open-ended feature of the present doctrine and allow both the reserved water rights users and state water rights users to deal with a definitive quantity of water.

184. The Department of Justice is the only department of the federal government that may initiate adjudication of water rights reserved by the United States. *See* Ranquist, *supra* note 3, at 678. The Supreme Court is the only court with jurisdiction to adjudicate Indian water rights on an interstate watershed, along with the rights of *all* other claimants. If the Court declines to hear the controversy, the water rights cannot be established in final relation to one another regardless of the desire of affected water users to have their claims determined. *Id.* at 717.

185. *See* note 153 *supra*. 28 U.S.C. § 1441(c) grants a federal court discretion in a removed case to hear only those claims presenting a federal question and remand all other matters to the state courts for determination. When this occurs, it results in two separate court systems simultaneously litigating claims to a limited supply of water on the same watershed. The decrees are frequently fraught with inconsistencies.

186. *See, e.g.*, PUBLIC LAND LAW REVIEW COMMISSION, ONE-THIRD OF THE NATION'S LAND 144, 146 (1970). The Public Land Law Review Commission advised:

> Recommendation 56: The implied reservation doctrine . . . be clarified and limited by Congress in at least four ways: (a) amounts of water claimed, both surface and underground, should be formally established; (b) procedures for contesting each claim should be provided; (c) water requirements for future reservations should be expressly reserved; and (d) compensation should be awarded where interference results with claims valid under state law before the decision in Arizona v. California.

See also NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE 459-83 (1973).

Judicial Solutions

In view of the past inability of Congress to settle the conflict between federal, Indian, and state water rights, an immediate congressional solution is questionable. Absent that legislative solution, the judiciary is the sole forum for resolving these controversial issues and the problem of inconsistent application and interpretation of the implied-reservation-of-water rights doctrine will likely continue. However, the Supreme Court has provided some guidelines, which, if employed by the lower courts, would help minimize the inconsistencies. The trend of narrowly limiting the implied-reservation-of-water rights doctrine to the original purposes of the reservation when quantifying non-Indian reserved water rights should be extended to Indian reserved water rights. In the past, even narrow interpretation of an agrarian purpose as the original purpose for which Indian reservations were created has provided more than adequate quantities of water for Indian tribes.[187] The courts should also impose a requirement of reasonableness, demonstrated by present needs and uses, when quantifying the reserved Indian water right. Populations on the reservations have been declining in recent years and greatly expanded domestic and agricultural needs on the reservations will probably not be required. However, reasonably foreseeable future domestic and agricultural needs could easily be accommodated in the decrees where reservation development is minimal.

Whenever Indian and federal reserved claims are situated on heavily appropriated streams, the courts should attempt to achieve an equitable solution in resolving the water rights controversies on those streams. As currently applied, the doctrine permits new reserved water rights uses to eliminate state and private uses, including nominal domestic uses, should insufficient quantities of water be available to meet the new reserved rights needs. Although the Supreme Court in *Arizona v. California*[188] explicitly rejected the doctrine of equitable apportionment as a means of quantifying implied-reservation-of-water rights, the Court should reevaluate and reject that stance. Unlimited quantities of reserved rights endanger the established state water rights and the prosperity of the water-needy western states. By equitably apportioning a limited resource among its users, according to reasonable need, a court would promote the best use of a scarce resource. It could simultaneously protect established uses, while still ensuring adequate levels of water for the efficient management and protection of reserved federal lands.

187. *See* note 80 and accompanying text *supra*.
188. 373 U.S. 546, 597 (1963).

Four decades ago, Justice Holmes decribed a river as "more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it."[189] The concept of fairly rationing waters among all users has been used by the Supreme Court in dealing with interstate stream allocations. The doctrine of equitable apportionment was first applied to an interstate stream in *Wyoming v. Colorado*.[190] The Court settled the dispute by apportioning to each state a just and reasonable share of the benefits of the stream's flow. Although the doctrine of equitable apportionment retains some of the nebulous aspects inherent in the present methods of quantifying reserved water rights, the doctrine imposes a more equitable solution and allows the Court to quantify rights once and for all. Moreover, the Court generally attempts to protect existing rights under the equitable apportionment doctrine[191] and recognizes a hierarchy of use, ensuring protection of at least nominal domestic and agricultural needs for all classes of users. Should the government or Indian tribes need additional quantities of water at a future date, the federal government still has the doctrine of eminent domain, with its accompanying right to compensation, at its disposal to procure additional water. The use of the power of eminent domain would enable increased water allotments to meet the expanded needs of federal and Indian reservations, but would also compensate established state and private users for their displaced rights and investments, thus easing economic hardships. By dealing with the water needs of the federal reserved lands and Indian tribes under the doctrine of equitable apportionment and the federal powers of eminent domain, the costs of compensation are treated as a national obligation. Expansive reserved water rights needs would be funded from the Treasury rather than borne by a select group of local individuals. In addition, compen-

189. New Jersey v. New York, 283 U.S. 336, 342 (1931).

190. 259 U.S. 419 (1922).

191. For example, in Nebraska v. Wyoming, 325 U.S. 589, 618 (1945), the Court stated:

> Apportionment calls for the exercise of an informed judgment on a consideration of many factors. . . . physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses . . . the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former—these are all relevant factors. They are merely illustrative, not an exhaustive catalogue.

sation would ease the inequity of displacing large investments in irrigation and municipal water supplies made over the decades.

Each western state should develop a comprehensive scheme for the continuous adjudication of all water rights with respect to every watershed in the state. The Supreme Court noted with approval in *Colorado River Water Conservation District v. United States*[192] the system established by Colorado, indicating that it provided an adequate forum for the proper and efficient disposition of water rights controversies.[193] Establishing a separate state water rights determination system for the comprehensive management of watersheds and the continuous resolution of controversies would promote more efficient resolution of general water rights adjudications and thereby reduce interference with normal alienation of property rights and the economic stability of the concerned watersheds. The federal government would continue to represent federal and Indian water rights interests within that forum. The separate system would eliminate the present problem of delay because of crowded state and federal court dockets, bringing a controversy to a more rapid conclusion. A special water adjudication court would have the advantage of specialized expertise applying both state and federal water laws on an exclusive and comprehensive basis.

CONCLUSION

The demand for western waters will soon exceed the present sources of supply. Conflict between the states and the federal government over the control and use of that supply will continue to grow sharper, and serious confrontations can be expected. The legally superior reserved water rights preempt later dated state water claims, including domestic uses. Unquantified, open-ended reserved water claims disrupt state water systems and impede sound, coordinated planning.

Basing their argument upon Indian sovereignty rights, Indians assert that their water rights claims are distinct from other reserved federal claims, and they seek expansive reserved water rights under the doctrine of implied-reservation-of-water rights. The most controversial and least justifiable aspect of those expansive claims involves the right to market the reserved rights for off-reservation uses, potentially destroying state water administration and distribution schemes. In addition, established state investments and uses may be preempted without compensation for

192. 424 U.S. 800 (1976).

193. Colorado Water Rights Determination and Administration Act, COLO. REV. STAT. ANN. §§ 37-92-101 to 37-92-602 (1976).

the water right or the investment in water resource projects when these expanded rights are exercised.

A three-way conflict is inherent in any water rights adjudication on watersheds where reserved water rights exist. States seek to protect established state water uses against all reserved claims. The federal government seeks control over the state regulatory powers in order to protect its own perception of national and Indian water resource interests. Federal and Indian reserved claims, meanwhile, are often diametrically opposed and the tribes seek to force the federal government to carry out its fiduciary duty to protect Indian water rights against both encroaching state and non-Indian reserved federal water rights claims.

The Supreme Court has recently limited the reserved water rights for non-Indian federal reservations, quantifying the rights in terms of the amounts needed to fulfill the original purposes of the reservation and no more.[194] By limiting the federal and Indian water rights reserved claims to uses contemplated by the original purposes of the reservation, unlimited water claims for power plants, energy development, and water marketing would not be included under the doctrine. However, until such time as Indian and federal rights are permanently quantified and coordinated with state laws, water users relying on water from heavily appropriated streams are subject to the displacement of long-established uses without compensation.

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194. United States v. New Mexico, 438 U.S. 696, 700 (1978); Cappaert v. United States, 426 U.S. 128, 141 (1976).